No. 97-843

In The

Supreme Court of the United States

October Term, 1998

AURELIA DAVIS, as next friend of Lashonda D.,

Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which was enacted pursuant to the Spending Clause of Article I of the United States Constitution, encompasses a cause of action against a school district receiving federal funds based upon a claim of student-to-student sexual harassment under a hostile environment negligence theory.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF JURISDICTION

Petitioner filed her Petition for Writ of Certiorari seeking review of the Eleventh Circuit Court of Appeals' judgment affirming the district court's order dismissing Petitioner's complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim for which relief may be granted under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves a question of first impression under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The Court is being asked to determine whether the following provision of Title IX encompasses a damage claim against a school district for student-to-student sexual harassment based upon a hostile environment negligence theory:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

STATEMENT OF THE CASE

A. Course of Proceeding and Disposition Below

Petitioner Aurelia Davis a/n/f of LaShonda D. filed a complaint against the Monroe County Board of Education, the superintendent of schools, and an elementary school principal alleging claims under 42 U.S.C. § 1983 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Pet. App. at 93a. The complaint alleged that Petitioner's daughter had been subjected to a sexually hostile environment by a fellow fifth-grade student at Hubbard Elementary School. It further alleged that the incidents of sexual harassment had been reported to her daughter's teachers and the principal, and that no action or insufficient action was taken in response to her complaints. Pet. App. at 95a-98a.

Respondents moved to dismiss, contending that Petitioner's complaint failed to state a claim for which relief could be granted under either Title IX or § 1983 (Record 12). The district court dismissed Petitioner's § 1983 claim finding that under the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Respondent's had no constitutional duty to protect LaShonda from the actions of a third party absent the existence of a special relationship. *Davis v. Monroe County Bd. of Ed.*, 862 F. Supp. 363, 364-65 (M.D. Ga. 1994). Pet. App. at 87a.

The district court further held that Petitioner's Title IX claim had no basis in law because Petitioner did not allege that the Board had any role in the harassment and that the sexually harassing behavior of a fellow fifth

grader was not part of an education program or activity receiving federal aid, *Id.* at 88a. Petitioner appealed.

A three-judge panel of the Eleventh Circuit Court of Appeals unanimously affirmed the dismissal of Petitioner's § 1983 claims without discussion, *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1189 (11th Cir. 1996) *vacated* and *reh'g en banc* granted, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 62a-63a. A divided panel reversed the district court's finding that Title IX did not provide a cause of action for student-to-student sexual harassment based upon a hostile environment negligence theory, and held that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a.

Judge Birch dissented from the majority's holding stating that the majority made an "unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student." *Id.* at 79a. He argued that the language of Title IX does not indicate that such a cause of action was intended to be covered by its scope. *Id.*

Judge Birch further argued that even if Title IX encompasses student-to-student sexual harassment, it should only cover intentional conduct on the part of the school board rather than a claim for negligent failure to intervene to prevent sexual harassment as alleged by Petitioner. *Id.* at 80a. Finally, Judge Birch argued that the remedy available for unintentional violations of Title IX should be limited to injunctive relief based upon this Court's precedents holding that Title VI (and therefore

Title IX) does not support a monetary damages remedy for unintentional discrimination. *Id.*

Respondents filed a Suggestion of Rehearing En Banc with respect to the Petitioner's Title IX claims which was granted by the Eleventh Circuit on August 1, 1996, vacating the panel's opinion. Pet. App. at 91a. Subsequently, the Eleventh Circuit sitting *en banc* affirmed the district court's dismissal of Petitioner's complaint finding that the Title IX , which was enacted by Congress pursuant to its spending power, did not provide school districts with notice that they would be liable in monetary damages for the actions of one student toward another student in the language of Title IX or its legislative history. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). Pet. App. at 33a.

B. Statement of Facts

Because Petitioner's complaint was dismissed pursuant to Fed.R.Civ.P. 12(6), the factual record has not been developed. Petitioner's complaint alleged that beginning on or about December 17, 1992 and continuing through May 19, 1993, Petitioner's daughter LaShonda was harassed by a fellow fifth grade student and classmate, G.F. Pet. App. at 95a-96a. The alleged harassment consisted of repeated attempts by G.F. to touch LaShonda's breasts and vaginal area, vulgar language by G.F. directed toward LaShonda, (e.g., "I want to get in bed with you" and "I want to feel your boobs"), placing a door stop in his pants and behaving in a sexually suggestive manner toward LaShonda, and rubbing his body against LaShonda's in what LaShonda felt was a sexually suggestive way while walking to lunch. *Id.* The complaint

alleges that each incident was reported to a teacher supervising the classroom. *Id.*

The complaint alleged that LaShonda's assigned seat in Diane Fort's class was next to G.F.'s seat and that despite LaShonda's requests, she was not allowed to change seats for over three months. Pet. App. at 97a. The complaint further alleged that G.F. was subsequently charged with and pled guilty to sexual battery. *Id.* Petitioner's complaint asserts that the "harassment" was detrimental to LaShonda's mental health and affected her ability to concentrate on her school work resulting in a decline in LaShonda's grades. *Id.*

Finally, Petitioner's complaint alleges that G.F. was not suspended, kept away from LaShonda, or disciplined after repeated complaints by LaShonda and her mother. *Id.* However, G.F. was suspended for slapping another child who was white. Pet. App. at 98a. Petitioner's complaint also alleged that G.F. had sexually harassed other girls in the class.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that Title IX does not encompass a claim based on a school official's alleged failure to take reasonable action to remedy student-to-student sexual harassment. Since Title IX was enacted pursuant to Congress' spending power, Congress must unambiguously set forth all conditions placed on a grant recipient in order to provide notice to the recipient of its obligations. Nothing in the language of Title IX put Respondents on notice that they could be held liable in damages for student-to-student sexual harassment.

Nor does the legislative history of Title IX support a claim for student-to-student sexual harassment. The legislative debate surrounding the enactment of Title IX focused on acts by grant recipients and did not address sexual harassment or student-to-student sexual harassment.

Additionally, the Department of Education Office of Civil Rights' Sexual Harassment Guidance is not entitled to deference from this Court because it was not in existence at the time that the incidents alleged in Petitioner's complaint took place and cannot be applied retroactively. Further, the Office of Civil Rights' Sexual Harassment Guidance was created for purposes of litigation. The only policy guidance in existence from the Office of Civil Rights at the time of the incidents alleged by Petitioner did not address student-to-student sexual harassment. Finally, the Office of Civil Rights' Sexual Harassment Guidance applies an incorrect Legal Standard.

This Court's decisions in *Gebser v. Lago Vista Ind. Sch. Dist.*, 520 U.S. 397 (1998) and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) do not support finding a cause of action for student-to-student sexual harassment under Title IX. These decisions reaffirm that Congress must provide recipients of federal funds with unambiguous notice of the conditions attached to the acceptance of such funds before they can be held liable in damages. Contrary to Petitioner's argument, in *Gebser* and *Franklin* this Court never discussed the issue of whether educational institutions can be held liable for student-to-student sexual harassment. Moreover, a proper reading of both cases militates against a finding

that Title IX encompasses a claim for student-to-student sexual harassment.

Title VI principles should apply to this case and do not support a claim for student-to-student sexual harassment. Title VI of its own force reaches no further than the constitution. Title IX is to be construed like Title VI. Accordingly, like Title VI, Title IX reaches no further than the Constitution in the absence of regulations extending its reach to impact discrimination. No regulations have been enacted under Title IX addressing student-to-student sexual harassment or hostile environment sexual harassment. Consequently, Title IX reaches no further than the Constitution. Inasmuch as Respondents had no constitutional duty to protect LaShonda from the harassing conduct of a fellow student, they had no such duty under Title IX.

Moreover, Title IX was enacted pursuant to the Congress's Spending Clause Power and therefore compensatory damages are only available for intentional violations. Petitioner's complaint alleged only a negligent failure to act and therefore fails to state a claim.

ARGUMENT AND CITATION OF AUTHORITY

The standard of review for a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is the same in this Court as in the district court. The Court in considering a motion to dismiss may look only at the pleadings, accepting all facts pleaded therein as true and viewing all reasonable inferences in a light most favorable to the plaintiff. A complaint should be dismissed if the plaintiff can prove no

set of facts entitling him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Applying this standard to the facts of this case, the Eleventh Circuit correctly affirmed the district court's dismissal of Petitioner's complaint.

I. The Eleventh Circuit Correctly Held That Title IX Does Not Encompass A Claim Based On Student-to-Student Sexual Harassment

In Count I of her complaint Petitioner alleges that:

> The persistent sexual advances and harassment by the student G.F. upon Plaintiff interfered with her ability to attend school and perform her studies and activities. Had Defendant Bill Querry intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have ended . . . the deliberate indifference by Defendants to the unwelcomed sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abusive school environment in violation of Title IX of Education Amendments of 1972. . . . Pet. App. at 100a.

Petitioner contends that Respondents' alleged failure to protect LaShonda from the sexually harassing actions of a fellow student created a hostile environment and states a claim for damages under Title IX. Petitioner is wrong.

In affirming the district court's dismissal of Petitioner's Title IX claim the Eleventh Circuit held, " . . . an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding. The threat of whipsaw liability in a substantial number of cases

would materially affect a Title IX recipient's decision to accept federal funding, yet Congress did not provide unambiguous notice of this type of liability in the language or the history of the statute." *Davis*, 120 F.3d. at 1406. Contrary to Petitioner's assertions, the Eleventh Circuit's holding is supported by the plain language and legislative history of Title IX and the prior decisions of this Court.

A. The Plain Language of Title IX Does Not Provide A Cause Of Action Against A School District For Student-to-Student Sexual Harassment

As with any statute, the starting point in determining the scope of Title IX is its statutory language. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Title IX provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Title IX does not *expressly* create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006 (6th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 165 (1996). Neither should the statute be interpreted so as to *imply* such a cause of action.

Title IX is a funding statute enacted pursuant to Congress's spending power. *Id.* "As an exercise of Congress's spending power, Title IX makes funds available to a recipient in return for the recipient's adherence to the conditions of the grant." *Id.* at 1012-13. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' . . . There can, of course be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U.S. at 17. Thus, if Congress is going to put a condition on the grant of federal money, it must do so "unambiguously." *Id.* This Court reasoned that because the recipient of federal aid voluntarily consents to accept the aid and consequent federal requirements, the recipient should not be held liable for compensatory relief absent notice that it is committing some act in violation of the federal requirements. *Guardians, Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

Contrary to Petitioner's assertions, by its plain language, Title IX prohibits discriminatory acts only by grant recipients. *Rowinsky*, 80 F.3d at 1012. Under Title IX, recipient means:

> Any state or political subdivision thereof, or any instrumentality or a state or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h). The definition of recipient does not include students. Nothing in the language of Title IX would put a recipient on notice that by accepting federal funds, it was opening itself up to unlimited liability for the actions of a student or third party individuals. Judge Birch recognized this in his dissent from the vacated panel opinion in this case wherein he stated:

> There is no indication in the language of Title IX that such a cause of action [student-to-student sexual harassment] was intended to be covered by its scope; rather, the statute states that '[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal financial assistance.' In this case, the school board . . . is not alleged to have committed any act of harassment against LaShonda nor is any employee of the school board. Rather, the Plaintiff seeks to hold the school board liable for negligently failing to protect another student, not its employee, from sexually harassing LaShonda. In my opinion, this student-on-student sexual harassment case clearly falls outside of the purview of Title IX.

Davis v. Monroe, 74 F.3d at 1196. As the Fifth Circuit noted in *Rowinsky*, "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX." *Rowinsky*, 80 F.3d at 1013. The Fifth Circuit held "[t]hus, the structure of Title IX supports the conclusion that the

spending conditions apply only to the conduct of grant recipients." *Id.*

Title IX is an anti-discrimination statute: "No person . . . shall . . . be subjected to discrimination. . . . " In recognition of this fact this Court held in *Gebser* that "Title IX focuses on protecting individuals from discriminatory practices carried out by recipients of federal funds," *Gebser*, ___ U.S. at ___, 118 S. Ct. at 1997, and "that Title IX was designed 'primarily' to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." *Id.* at 2000. Thus, it is clearly the actions of recipients that Title IX was designed to address. Petitioner does not contend that G.F. was a recipient of federal funds as defined by Title IX. Rather, Petitioner makes the disingenuous argument that the statute focuses on the harm done to the individual in the educational program, not the identity of the person whose initial actions caused the discrimination with which it is confronted. Petitioner's argument is clearly not supported by the language of Title IX. Title IX simply says that if a school district elects to accept federal funding then it, the school district, shall not discriminate against an individual in its educational programs on the basis of sex. Nowhere in Title IX is a recipient of federal funds put on notice that it could be held liable in money damages for the action of one student toward another student.

Moreover, at the time Petitioner filed her complaint, no court, including this Court had recognized the concept of sexual harassment in any context other than the employment context. Nor had any Court extended the

concept of sexual harassment to the misconduct of emotionally and socially immature children. The type of conduct alleged by Petitioner in her complaint is not new. However, in past years it was properly identified as misconduct which was addressed within the context of student discipline. The Petitioner now asks this Court to create out of whole cloth a cause of action by labeling childish misconduct as "sexual harassment," to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct, something this Court has consistently refused to do. *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the court to set aside decisions of school administrators which the court may view as lacking basis in wisdom or compassion.") While this Court has previously held that Title IX should be given a scope as broad as its language, that scope is not without limitations. The plain language of Title IX simply does not contemplate the cause of action which Petitioner asks this Court to create.

B. The Legislative History of Title IX Does Not Support A Claim For Student-to-Student Sexual Harassment

While Petitioner spends much time in her brief quoting testimony during the legislative debates surrounding Title IX and failed attempts to narrow its scope, Petitioner does not dispute in her brief, that the issues of student-to-student sexual harassment and discipline were not raised during the legislative process. Indeed, as Petitioner notes in her brief, hostile environment sexual harassment

was not recognized as a form of sex discrimination at the time Title IX was enacted. Moreover, this Court did not address the concept of sexual harassment under Title IX until this year. Thus, it cannot reasonably be argued that Congress could have intended that Title IX would encompass a claim for student-to-student sexual harassment or that school districts were on notice that by accepting federal funds under Title IX they were accepting liability for the actions of a third party.

As the Eleventh Circuit correctly noted, the House Subcommittee on Education's work focused on eliminating gender discrimination in school admissions and in the employment decisions of school administrators. *Davis*, 120 F.3d at 1396. Nowhere in the long process of enacting Title IX was the issue of student-to-student sexual harassment considered or discussed.

Moreover, in *Rowinsky*, the Fifth Circuit examined the legislative history of Title IX and correctly read it to support limiting the statute to the practices of grant recipients citing the fact that "both supporters and opponents" of the legislation focused exclusively on acts by the grant recipients. *Id.*, 80 F.3d at 1014, citing 118 Cong. Rec. at 5803 (1992). During the Senate debate on Title IX Senator Bayh stated that:

> . . . we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever. . . . While the impact of this amendment would be far-reaching, it is not a panacea.

118 Cong. Rec. at 5808, 5812. Senator Bayh described the heart of amendment as "a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.* at 5803. Further, as the Fifth Circuit noted, the original amendment mandated a study of sex discrimination in order to suggest further legislative remedies. *Id.* Implicit in the mandate of such a study is a recognition that Title IX did not and was not intended to address every situation and might have to be amended at some later date.

Petitioner's reliance on the examples of discrimination in the regulations in support of her position is misplaced. It is clear from a cursory reading of the examples that they address the responsibility of recipients of federal funds when contracting with outside agencies or entities to provide services to their students. Nowhere in the regulations is a situation analogous to that which is before the Court discussed. Respondents had no contractual relationship with G. F. to provide educational services to LaShonda. Thus, the Title IX regulations relied on by Plaintiff to extend the reach of Title IX to student-to-student sexual harassment are inapposite.

As Petitioner points out in her brief, Congress has previously acted to overrule this Court's ruling in *Grove City College v. Bell*, 465 U.S. 555 (1984) which limited the application of Title IX to the particular program or activity receiving federal funds. If Congress had desired to

amend Title IX to cover peer sexual harassment it could easily have done so. Petitioner asserts in her brief that Congress heard testimony regarding student-to-student harassment in connection with the Civil Rights Restoration Act of 1988. Thus, if Congress had desired to amend Title IX to include a claim for student-to-student sexual harassment it could have done so at that time. Congress did not do so.

If Title IX is to encompass a claim for damages against school districts for student-to-student sexual harassment, it should be left to Congress, to state explicitly that Title IX should cover such a claim. As this Court has observed, ". . . policy considerations are for Congress to weigh and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice." *North Haven*, 456 U.S. at 535 n.26.

Congress should have the opportunity to weigh the implications of creating such a cause of action, the standard for proving such a claim, the damages that would be available, and the social ramifications of creating a cause of action which makes school districts liable for the actions of children. As the Eleventh Circuit noted nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages. *Davis*, 120 F.3d at 1402.

As a consequence, the accused student's right to due process will be implicated creating other legal and financial concerns for school districts. If school districts are going to be placed under such a burden, it should be left to Congress to say so through the legislative process.

II. During the 1992-93 School Year, There Were No Federal Rules or Guidelines on Sexual Harassment in the Primary and Secondary Schools. The Monroe County School District Should Not be Exposed to Damages Suits Based on the Retroactive Application of Federal Guidelines That Did Not Exist Until 1997.

A. The Office for Civil Rights Never Notified the Nation's Public Schools Until 1997 That Title IX Covered Student-To-Student Misconduct.

The Brief of the United States criticizes the School District for not having a "sexual harassment" policy during the 1992-93 school year and for not giving its employees "guidance" on how to respond to student complaints. (U.S. Brief at 4.) This criticism is ironic and unfair because, during the time in question, the U.S. Department of Education itself never informed the nation's public schools that Title IX covered "sexual harassment" among students.[1] The Department never gave any guidance until August 1996 when it published a draft of a brand new policy guidance that interpreted Title IX to include a prohibition against "sexual harassment" among primary and secondary school students, *See* 61 Fed. Reg. 42,728 (Aug. 14, 1996). Those guidelines

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[1] The criticism also overlooks the fact that every school district prohibits assaults, vulgarity, and other misconduct. Application of the label "sexual harassment" with respect to children is a recent phenomenon of little real utility. Schools punish specific acts of misconduct, not labels.

were not finalized and distributed to the nation's school superintendents until March, 1997. See Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12039 (1997).

Prior to the issuance of the OCR Guidance, school superintendents relied on the Department's Title IX regulations, which were and are completely silent on the subject of "Sexual Harassment." See 34 C.F.R. §§ 106.01-106.61 (1995). In contrast, the regulations provide explicit detail concerning the administration of athletics, admissions policies, housing and the like. *Id.*

The earliest publications of the Department's Office for Civil Rights show that OCR never addressed (i) harassment in the primary and secondary schools or (ii) student-on-student sexual harassment. Perhaps reflecting Title IX's origin as a statute to end discrimination in higher education, OCR did look at harassment by *university professors. See, e.g.*, OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981); "Sexual Harassment: It's Not Academic" (OCR pamphlet, August 1984).

The first reported case[2] involving student-on-student misconduct under Title IX did not appear until August 30, 1993—after LaShonda's alleged problems at Hubbard Elementary School. In November 1993, again after

[2] *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993), reconsidered and revised, 949 F. Supp. 1415 (N.D. Cal. 1996).

LaShonda's alleged complaints, OCR was still telling public schools that it had no policy guidance addressing the unique environment of the public schools or the unique issue of student-on-student misbehavior. See Appendix A, letter of Stacey Roseberry, Attorney Advisor, Elementary and Secondary Education Policy Division, Office for Civil Rights (Nov. 12, 1993). The Petitioner suggests that three OCR "letter findings" from 1989, 1992, and 1993[3] support her argument that all school districts were on notice that Title IX covered student-on-student sexual harassment. The letters were not distributed to other school districts. The three letters in question were authored by regional OCR staff members in connection with three specific investigations and are not accorded the deference owed to agency-wide regulations.[4] Significantly, these three letters were written before the non-committal letter that the national office of OCR wrote in November 1993.

[3] Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992); Letter of Findings by Kenneth Miles, Regional Civil Rights Director, Region V (April 27, 1993); Letter of Findings by John E. Palamino, Regional Civil Rights Director, Region IX (May 5, 1989).

[4] See generally *Rowinsky*, 80 F.3d at 1015 (OCR investigation letters were not owed deference); *Wolpow v. Commissioner of Internal Revenue*, 47 F.3d 787, 791 (6th Cir. 1995) (case-specific interpretation taken in litigation obtains no deference); *Kelly v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1884) (deference to agency's interpretation as "prosecutor" was inappropriate); K. Davis, Administrative Law Treatise 17 (3d ed.1994) (level of deference depends on whether the rule was authored by the agency or merely a member or portion of the agency's staff).

B. The Office for Civil Right's Sexual Harassment Guidance Deserves No Deference Because it was Created For Purposes of Litigation, 25 Years After Passage of Title IX.

Both the Petitioner and the United States suggest that the Department of Education has had a "longstanding" position concerning liability for sexual harassment in the primary and secondary schools. This conclusion is unsupportable. The Sexual Harassment Guidance issued in March 1997 by the Office for Civil Rights represents a new position. While agency interpretations of a statute are entitled to deference if they are "longstanding," *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.11 (1982), where the agency's position has not been demonstrably consistent over time or is unclear, then the interpretation is not owed deference. See *Id.* at 522 n.11 and 538 n.29.

The OCR Guidance deserves no deference because it was written for purposes of litigation. The first draft of the Guidance was published on August 14, 1996—just in time for inclusion in an amicus brief filed that same week in this Court in another Title IX case, *Rowinsky v. Byran Indep. Sch. Dist.* The agency refused public comment on the substance of the draft Guidance. See 61 Fed. Reg. 42728 (Aug. 14, 1996).[5] The agency's apparent rush to create Guidance in time for filing with this Court in *Rowinsky*, combined with the agency's refusal to take public comment, undercuts any deference argument. See, e.g., *Kelly v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994)

[5] See Brief of United States in No. 96-4, p.2 & 11 (August 1996).

(agency's interpretations for purposes of litigation deserve no deference).

Moreover, the other usual factors supporting deference—including contemporaneous adoption with the statute, agency expertise, and formality—are entirely missing in this instance. *See generally Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1033-34 (7th Cir. 1997) (declining to defer to the OCR Guidance because it was neither a regulation nor an interpretation of a regulation); *see also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (listing deference factors); *Batteron v. Francis*, 432 U.S. 416, 425 n.9 (1977) (timing of the agency's position is a factor as is agency's expertise over the subject matter); *Board of Educ. v. Harris*, 622 F.2d 599 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981) (declining to defer to agency position that did not involve agency's expertise).

OCR expertise is irrelevant to the question of when damages are available under Title IX, "a function clearly within the purview of judicial competence," *Captino v. Secretary of Health & Human Servs.*, 723 F.2d 1066, 1075 (2nd Cir. 1984). Nor has the Department's position on damages under Title IX been consistent. During this Court's consideration of *Franklin v. Gwinnett County Pub. Sch.*, the United States filed an amicus brief *opposing* money damages for *any* Title IX claims.

C. The OCR Guidance May Not Be Applied Retroactively to Create a Damages Claim Where None Previously Existed.

The OCR Guidance should not be applied retroactively to impose damages liability against school districts. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648,

658 (5th Cir. 1997) (Department of Education "cannot modify past agreements with [federal grant] recipients by unilaterally issuing guidelines through the Department of Education"); *see also Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (conduct ordinarily should be assessed under the law that existed when the conduct took place). The OCR Guidance fails to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department of Education to promulgate retroactive rules. *See* 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. *See Wright v. Director, Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988) (agency's power is limited to authority delegated by Congress).

D. The OCR Guidance Applies an Incorrect Legal Standard.

The OCR Guidance is not entitled to deference for the further reason that it applies an incorrect legal standard. Although it is not entirely clear, the OCR Guidance seems to adopt Title VII legal principals governing sexual harassment in the workplace and attempts to make them applicable to school districts throughout the country. According to the OCR Guidance, schools are liable for failing to eliminate:

> sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent,

> or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

62 Fed. Reg. 12,038. Moreover, the OCR Guidance warns administrator's that they may cause the school district to violate Title IX if they fail to exercise "due care" in discovering misconduct. *Id.* at 12,042. In addition, the OCR Guidance erroneously informs school districts that a single act of student harassment can cause a hostile environment and warns that in some instances nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment. *Id.* at 12,039, 12,041. This Court in *Gebser* has already rejected the application of Title VII legal principles to Title IX cases involving teacher-student sexual harassment. *Gebser*, ___ U.S. at ___, 118 S. Ct. at 1997-99. Thus, the OCR Guidance clearly attempts to extend the reach of Title IX beyond its scope as determined by its plain language, its regulations, and the holdings of this Court. As the Fifth Circuit noted in *Rowinsky*, OCR has no jurisdiction over sexual harassment by third parties unless the power of the school district is somehow implicated by the third party because 34 C.F.R. § 106.31(b) only prohibits discrimination by grant recipients. *Rowinsky*, 80 F.3d at 1015.

Accordingly, the OCR Guidance provided no guidance to the School District in this case or to school districts in future cases.

III. This Court's Decisions In *Franklin v. Gwinnett County Pub. Sch.*, and *Gebser v. Lago Vista Ind. Sch. Dist.* Do Not Support Finding A Cause Of Action Under Title IX For Student-To-Student Sexual Harassment

Petitioner and *amicus curiae* contend that *Franklin v. Gwinnett County Pub. Sch.*, supports an "occurs in" theory by finding that the school district had a duty under Title IX to prevent the alleged sexual harassment of LaShonda by G.F. In *Franklin*, this Court stated:

> Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates" on the basis of sex.' *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a *teacher* sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

Franklin, 503 U.S. at 75. (*emphasis added*). The comment quoted above was made by this Court in explaining its refusal to apply its holding in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which limits the remedies available under Spending Clause statutes when the alleged violation was unintentional to equitable relief. The Court did not compare Title IX and Title VII, did not define the standard of liability under Title IX for acts of agents (much less non-agents) and never used the phrase "hostile environment." The sole issue before the Court in

Franklin was whether compensatory relief was available under Title IX for intentional conduct. As the Supreme Court noted in *Franklin*, "[t]he question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists." *Franklin*, 503 U.S. at 65-66.

Moreover, Petitioner fails to comprehend the essential distinction between *Gebser*, *Franklin* and this case: the harassers in *Gebser* and *Franklin* were employees of the school district. It can reasonably be argued that Title IX would reach the intentional sexually harassing actions of a teacher upon a student since such conduct arguably violates Title IX by conditioning benefits in the federally funded program on impermissible criteria. *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D.Pa. 1989). However, in this case neither the school district, nor any of its employees is alleged to have committed any act of harassment against LaShonda.

Petitioner seeks to hold the school district liable for its negligent failure to prevent another student, not its employee, from harassing LaShonda. *Davis*, 74 F.3d at 1196. Petitioner has not alleged any act of intentional discrimination or discriminatory purpose against LaShonda by Respondents. Respondents' alleged failure to take action to remedy alleged sexual harassment of LaShonda does not demonstrate intent by Respondent to discriminate against LaShonda in an educational program or activity on the basis of her sex. As the court held in *Bougher*, "to suggest, as plaintiff must, that unwelcome sexual advances, from *whatever* source, official or unofficial, constitute Title IX violations is a leap into the

unknown which, whatever its wisdom is the job of Congress," *Bougher*, 713 F. Supp. at 145. There is nothing in *Gebser* and *Franklin* to support Petitioner's contention that Title IX encompasses a claim for student-to-student sexual harassment. However, Gebser does reaffirm that Title IX recipients must have notice of the obligations imposed upon by accepting federal funds. The required notice is absent in this case. Therefore, this Court should affirm the Eleventh Circuit's ruling.

IV. Title VI Principles Should Be Applied In Determining Liability Under Title IX And Do Not Support A Claim For Student-To-Student Sexual Harassment

Title IX was patterned after Title VI, which prohibits intentional race-based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). "Title VI on its own bottom reaches no further than the Constitution." *Guardians*, 463 U.S. at 603, citing, *University of California Regents v. Bakke*, 438 U.S. 265, 287 (1978); *accord, United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993). Thus, this Court has held that Title VI does not of its own force proscribe unintentional racial discrimination. *Guardians*, 463 U.S. at 540.[6] Inasmuch as Title IX is patterned after

[6] Although Title VI has been extended beyond the constitution to reach impact discrimination, the extension was based upon Title VI implementing regulations which explicitly forbade impact discrimination. *Id.*, 463 U.S. at 591. However, OCR has not implemented any regulations under Title IX specifically governing sexual harassment which would expand its scope to reach unintentional conduct and the complaint in this case does not set forth any claim based on impact or adverse effect. The Title IX regulations that do exist concern athletics, recruitment, admissions, financial aid and the like, 34 C.F.R. §§ 106.1-106.61, and are devoted to acts by recipients in administering those programs.

Title VI and it has been held that it should be interpreted in a similar manner, Title IX likewise reaches no further than the constitution, and does not proscribe unintentional sex discrimination.

It is unquestioned that the school district had no constitutional duty to protect LaShonda from the sexually harassing conduct of a private individual. *DeShaney*, 489 U.S. 189. Consequently, if the Constitution imposes no duty upon the school district to protect LaShonda, against acts of third parties neither does Title IX.

Further, Title IX like Title VI was adopted pursuant to Congress's spending power. *Guardians*, 463 U.S. at 603. Statutes adopted pursuant to Congress' spending power allow recovery of damages only where plaintiffs show intentional discrimination. *Id.* at 599-600.

In this case, Petitioner has alleged no act of intentional discrimination or discriminatory purpose on the part of the school district. What Petitioner has alleged is nothing more than negligence, i.e., that the school district negligently failed to prevent another student, not its employee, from harassing LaShonda or negligently failed to take sufficient action to end the harassment. However, a state actor's failure to remedy known private discrimination, such as harassment by students, does not make the state actor itself guilty of discrimination. Further, the

mere existence of sexual harassment does not necessarily constitute sexual discrimination. Discriminatory intent must be shown in every case. *Oncale v. Sundowner Offshore Services, Inc.*, ___ U.S.___, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998). Thus, it follows that discrimination by the recipient must be alleged and shown.

Petitioner has not alleged that any employee of the school district participated in the alleged harassment of LaShonda. This fact distinguishes this case from *Gebser* wherein it was alleged that a teacher had harassed a student and requires a different result. In *Gebser*, the act of the teacher, an agent of the school district, in harassing the student was an intentional act. However, in this case there is no agent of the school district who is alleged to have harassed LaShonda or acted with a discriminatory purpose to intentionally cause her harm. Consequently, Petitioner's complaint fails to state a claim for relief under Title IX.

Petitioner's reliance upon the Ninth Circuit's holding in *Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998), to support the claim for student-to-student sexual harassment under Title IX is misplaced. The Ninth Circuit relied upon an incorrect legal standard as enunciated in OCR's Guidance addressing Title VI. In fact the Ninth Circuit conducted no analysis of Title VI and nowhere discussed this Court's rulings which require that a party seeking damages under Title VI show intentional discrimination. Consequently, *Monteiro* offers no support for Petitioner's position.

CONCLUSION

For the foregoing reasons, the district court properly dismissed Petitioner's complaint for failure to state a claim for relief under Title IX.

Dated: December 7, 1998.

Respectfully Submitted,

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APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION
Washington, D.C. 20202

Nov. 12, 1993

Mr. Craig M. Atlas
Scolaro, Shulman, Cohen, Lawler,
Burstein, & Ferrara, P.C.
90 Presidential Plaza
Corner of Townsend and Harrison Streets.
Syracuse, New York 13202

Dear Mr. Atlas:

It is my pleasure to respond to your letter asking for information about sexual harassment in elementary and secondary education. In your letter, you specifically asked if the U.S. Department of Education Office for Civil Rights (OCR), has any information about suggested sexual harassment policies. You also asked whether there were any reported cases (or other information) on the following two issues: student-to-student sexual harassment at the primary education level, and what limits a school district should impose regarding hugging or other touching of students by staff members.

To date, we have found the following Title IX cases on sexual harassment in elementary and secondary education Gwinnett v. Franklin County Public Schools, 112 S.Ct. 1028 (1992); Patricia H. v. Berkeley Unified School District, ___ F.Supp. ___, 1993 WL 33510 (N.D. Cal.); and Doe v. Petaluma City School District, ___ F. Supp. ___, 1993 WL 359872 (N.D. Cal.).

I have enclosed the only existing OCR policy guidance on sexual harassment. Please note that this document was issued in 1981. While the procedural guidance is still good, the case law is outdated. This policy is currently under revision, and we are incorporating the issue of sexual harassment in elementary and secondary schools.

As for model sexual harassment policies for elementary and secondary schools, both the American Association of University Women (AAUW) and the National School Boards Association have sample policies. They may be contacted at the following addresses:

AAUW
Program and Policy Department
1111 16th Street, N.W.
Washington, D.C. 20036
(202) 785-7700

National Association of School Boards
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

We have not reviewed these policies, and we can not endorse them. However, they may be useful to your client. In addition, if either you or your client are trying to develop such a policy, you should also feel free to

contact our regional technical assistance staff at the following address:

Ms. Paula D. Kuebler
Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor
Room 33-130, 02-1010
New York, New York 10278-0082

I hope this information is helpful to you.

Sincerely,

Stacey Roseberry
Attorney Advisor
Elementary and Secondary
Education Policy Division
Office For Civil Rights

Attachment
As Stated